

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA §
§
VS. § CRIMINAL NO. H-90-424 (02)
§ CIVIL ACTION NO. G-05-141
GERMAN DUQUE §

OPINION AND ORDER

On September 6, 2005, a “Motion to Reopen Time to Appeal” was filed by German Duque, movant, in this 2255 action; this motion will be granted. Duque never received a copy of this Court’s Order, dated May 31, 2005, denying his timely filed motion under Rule 59(e). Consequently, Duque had no notice that the time for filing an appeal had begun to run. The instant motion, filed within 180 days of the Court’s ruling is timely under Rule 4(a)(6) of the Federal Rules of Appellate Procedure and, since the Government was never required to answer Duque’s motion, there can be no prejudice to any party before the Court. It is, therefore, **ORDERED** that Duque’s “Motion to Reopen Time to Appeal” (Instrument no. 454) is **GRANTED**.

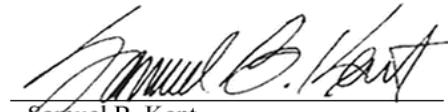
It is further **ORDERED** that Duque’s “Notice of Appeal” (Instrument no. 458) submitted contemporaneously with his Motion to Reopen is **DEEMED** timely filed.

Duque has also filed an Application for a Certificate of Appealability. In his Application, Duque complains that the Court did not specifically address each of his claims. Each of his claims, however, directly depends upon his argument that United States v. Booker, ____ U.S. ____, 160 L.Ed. 2d 621 (2005), is retroactively applicable to cases on collateral review. In the opinion of this Court, the rule in this Circuit is that Booker is not retroactively applicable to cases

on collateral review. Cf. In re: Elwood, 408 F.3d 211, (5th Cir. 2005) Accordingly, Duque' s Application for a Certificate of Appealability (Instrument no. 456) is **DENIED**.

In order to permit Duque the opportunity to seek a Certificate of Appealability directly from the United States Court of Appeals for the Fifth Circuit his " Motion to Proceed In Forma Pauperis" (Instrument no. 457) is **GRANTED**.

DONE at Galveston, Texas, this 15th day of September, 2005.



Samuel B. Kent
United States District Judge